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IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AND NATIONAL CENTER FOR VICTIMS OF CRIME AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

It is the mission of the National Coalition Against Domestic Violence ("NCADV") to address one of the greatest public health problems in America: domestic violence. NCADV is a nonprofit organization dedicated to providing advocacy, leadership, representation, and support to battered women and their children throughout the United States. NCADV's work includes coalition building at the local, state, regional, and national levels; support for the provision of community-based services such as safe houses and shelter programs; public education and technical assistance; policy development and innovative legislation; and efforts to eradicate the social conditions that contribute to domestic violence. NCADV's membership is comprised of over one thousand grassroots organizations, community programs, and individuals dealing with the concerns of battered women and their families.

NCADV was formally organized in January 1978, when over one hundred advocates from around the nation attended the U.S. Commission on Civil Rights hearings on battered women in Washington, D.C. Almost thirty years later, NCADV remains the only national organization of grassroots shelter and service programs for battered women. NCADV continues to be a leading voice on domestic violence issues in the community, the legislature, and in the courts.

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than counsel for the National Coalition Against Domestic Violence and the National Center for Victims of Crime made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief; their letters of consent have been filed with the Clerk of this Court.

NCADV organized testimony for the Attorney General's Task Force Hearings on Family Violence and worked with federal legislators to prioritize funding from the Victims of Crime Act for battered women's programs. In addition, NCADV supported the development and passage of the Violence Against Women Act in 1994 and was active in the passage of the Domestic Violence Offender Gun Ban in 1996. NCADV has been instrumental in implementing public policy and legislation that affect the lives of battered women and their children.

Likewise, the National Center for Victims of Crime ("NCVC") is a nonprofit organization whose mission is to forge a national commitment to helping victims of crime rebuild their lives. NCVC is the nation's leading resource and advocacy organization for all victims of crime. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, promotes laws and public policies that create resources and secure rights and protections for crime victims.

In particular, NCVC has demonstrated a strong commitment to victims of domestic violence, stalking, sexual assault, child abuse, and all those who are granted court orders of protection. NCVC's Public Policy Department was instrumental in the passage of the Violence Against Women Act in 1994 and its reauthorization in 2000. Additionally, NCVC's Stalking Resource Center provides training and technical assistance to law enforcement agencies across the country on the importance of protective orders and the need for their enforcement.

The issues presented in this case affect significant matters of public policy and are of vital concern to all victims of domestic violence. A decision by this Court will have

implications far beyond the interests of Jessica Gonzales and the City of Castle Rock. In their role as advocates, it is incumbent upon the NCADV and NCVC (collectively, "*amici*") to provide any additional facts necessary to inform and aid the Court in its deliberation on the issues. Therefore, *amici* submit the following historical overview of the genesis of mandatory arrest laws and their import to the enforcement of protective orders and the safety of battered women and children.

SUMMARY OF ARGUMENT

Domestic violence is a widespread and longstanding problem that continues to exact its toll on the lives of battered women and their children. In this country, victims of domestic violence have only begun to see changes within the last forty years. The lack of enforcement of these changes by police, however, has had devastating consequences. The lethal aftermath of police indifference is no more apparent than in the case of *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004), *cert. granted*, 125 S. Ct. 417, 160 L. Ed. 2d 316 (2004).

On the night of June 22, 1999, Jessica Gonzales telephoned the Castle Rock Police Department numerous times and appeared in person at the police station requesting enforcement of a restraining order against her estranged husband, Simon Gonzales, after he abducted their three daughters. *Id.* at 1097-98. Each time she sought the protection of the police and the safe return of her children, Jessica's pleas for help were ignored. *Id.* The Castle Rock Police Department refused to enforce the temporary restraining order in direct violation of Colorado's mandatory arrest law, a statute that removed any doubt as to the appropriate response and required the responding officers to arrest Simon

Gonzales. *Id.* at 1103-04; COLO. REV. STAT. § 18-6-803.5(3). While Jessica Gonzales was trying in vain to have the restraining order against her husband enforced, Simon Gonzales murdered the three girls. *Id.* at 1098. The Gonzales children were ages ten, nine, and seven. *Id.* at 1096.

Following an era when domestic violence was condoned by society and sanctioned by law, the civil protective order emerged at the forefront of the battle against domestic violence. The civil protective order represented one of the earliest and most commonly used interventions to help save the lives of battered women and their children. But, in many situations, orders of protection were effective only when police officers enforced them and abusers believed they would be enforced. For years, law enforcement failed to treat domestic violence as a crime or arrest the men who committed abuse and violated protective orders. It was this climate that gave rise to the mandatory arrest law.

Mandatory arrest laws were enacted to combat one of the most serious obstacles to curtailing the epidemic of domestic violence in America – police indifference. Mandatory arrest legislation was intended to alleviate the obstacle of under-enforcement by prohibiting police from dismissing domestic violence victims out of hand. Indeed, the Colorado legislation under which Jessica Gonzales sought enforcement of her protective order was passed to counteract the very attitudes that led to the deaths of three innocent children. Mandatory arrest laws, now in effect in more than twenty states and the District of Columbia, remove or restrict a law enforcement officer's discretion in determining whether to make an arrest in domestic violence cases. Mandatory arrest thus criminalizes domestic violence and sends a clear message to victims and perpetrators that the law will be enforced.

As *Gonzales* demonstrates, a protective order, without the backing of police enforcement, is only part of the solution. Orders of protection must be taken seriously, and mandatory arrest laws must be respected to ensure that the advances made in improving law enforcement's response to domestic violence endure. When the police fail to enforce the law, the severity of domestic violence is dismissed, abusers are empowered, and the foundation of the criminal justice system is weakened.

The Tenth Circuit Court of Appeals' decision in this case reaffirms to society and to law enforcement that domestic violence and the violation of protective orders are grievous crimes that must be treated accordingly. This nation has made tremendous strides in the protection and support of domestic violence victims over the last forty years. The protective order Jessica Gonzales sought to have enforced represented the promise that law enforcement would no longer dismiss claims of domestic violence. A reversal of the Tenth Circuit's decision will undo those efforts and represent a step backward in the struggle against family abuse. It will undermine the very purpose for which protective orders and mandatory arrest laws were implemented and dismantle the rights and remedies that the Colorado legislature so meticulously pieced together in the protection of battered women and their children. For these reasons, *amici* support Jessica Gonzales in urging this Court to affirm the decision of the Tenth Circuit Court of Appeals.

ARGUMENT

I. The United States Legal System Sanctioned Domestic Violence For Many Years.

The United States' early legacy of explicit approval of and, later, utter indifference to, acts of domestic violence traces its roots back to Roman times. In the year 753 B.C., Ancient Rome created the Laws of Chastisement, which expressly permitted husbands to strike their wives as a method of preventing the wife from exposing her husband to criminal and civil liability. *See* Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 714 (2004).

William Blackstone, the eighteenth century English legal scholar, subsequently endorsed and codified "domestic chastisement" as a form of behavior modification that was a tolerable and crucial part of the male-dominated family structure. 1 WILLIAM BLACKSTONE, COMMENTARIES *432-33; *see also* White, *supra*, 31 PEPP. L. REV. at 715. Under English common law, a man was allowed to beat his wife with a rod no larger than his thumb or small enough to pass through a wedding band; hence, the notorious "rule of thumb." *See* Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 535-36 (1996); *see also* James Martin Truss, Comment, *The Subjection of Women ... Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L. J. 1149, 1157 (1995). The law permitted corporal punishment as long as the husband did not inflict "permanent injury" upon his wife. *See* Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2118 (1996). The colonists

later brought this common law doctrine to America. *See* Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169, 172 (2001).

Colonial America's permissive attitude toward domestic violence and wife abuse continued well into the mid-nineteenth century. *See id.*; *see also* Wanless, *supra*, 1996 U. ILL. L. REV. at 535-36. This tradition was reflected in a number of cases from the states' highest courts. *See*, *e.g.*, *Bradley v. State*, 1 Miss. 156, 1824 WL 631, *1 (Miss. 1824) (upholding husband's entitlement to "exercise the right of moderate chastisement"); *Joyner v. Joyner*, 59 N.C. 322, 1862 WL 892, *3 (N.C. 1862) (declaring that "the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place"). As one court explained, "when the wife is ill treated on account of her own misconduct, her remedy is a reform of her own manners." *Skinner v. Skinner*, 5 Wis. 449, 1856 WL 3888, *3 (Wis. 1856).

By the end of the nineteenth century, wife-beating was no longer sanctioned by the doctrine of domestic chastisement, but courts continued to turn a blind eye to domestic abuse under the theory that doing so preserved the so-called "sanctity of the home," protected the "privacy of the marriage relationship," and served to "promote domestic harmony." *See* Truss, *supra*, 26 ST. MARY'S L. J. at 1159; *see also* Siegel, *supra*, 105 YALE L. J. at 2120. According to prevailing reasoning, domestic violence was a private family matter, and the government was loathe to interfere in the sanctified realm of the family. *See* Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1288-

89 (2000); *see also* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1850-51 (2002). As one court declared: "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence." *State v. Rhodes*, 61 N.C. 453, 1868 WL 1278, *4 (N.C. 1868); *see also Bradley*, 1824 WL 631 at *1 (noting that "family broils and dissentions" were not the business of the court); *State v. Oliver*, 70 N.C. 60, 1874 WL 2346, *2 (N.C. 1874) (stating that "[i]f no permanent injury has been inflicted, . . . it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive"). Consequently, while no longer legally sanctioned, domestic violence continued virtually unacknowledged by the public and unabated by the justice system until the 1960s. Wanless, *supra*, 1996 U. ILL. L. REV. at 536.

With the evolution of the battered women's movement in the late 1960s and early 1970s, it became readily apparent that the domestic violence crisis in America was anything but "trifling" – it was an epidemic. *Id.*; Epstein, *supra*, 43 WM. & MARY L. REV. at 1849-50; *accord* Siegel, *supra*, 105 YALE L. J. at 2171-73. In reaction to staggering statistics documenting the incidence of domestic violence,[2] the community responded with social services in the form of safe houses, women's shelters, and other programs to assist victims and educate the public. *See* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13-23 (2000)

2. *See, e.g.*, Catherine F. Klein & Leslye E. Orloff, Symposium on Domestic Violence, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 HOFSTRA L. REV. 801, 807-810 (1993) (compiling statistics from late 1970s to early 1990s as reported by Bureau of Justice Statistics, Department of Justice, National Institutes of Mental Health, and congressional hearings).

(tracing history of domestic violence reform); *see also* Leigh Goodmark, Symposium, The Legal Response to Domestic Violence: Problems and Possibilities, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 9 (2004). Legislative responses in the form of civil interventions on behalf of battered women followed shortly thereafter. Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 9-10.

One of the earliest innovations that was developed to ensure domestic violence would be treated seriously was the civil protective order. *See id.* at 10; *see also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L. J. 1153, 1170 (1995). In 1970, the District of Columbia passed the first law providing for protective orders in cases of domestic violence. *See* D.C. CODE § 16-1001, *et seq.*; *see also United States v. Harrison*, 461 F.2d 1209 (U.S. App. D.C. 1972). Before that time, the only civil tools available to battered women were injunctions pursuant to divorces or legal separation – remedies that provided limited relief, were difficult to enforce, and useless to women who were not married to their abusers. Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 10 n.14. By 1989, all fifty states and the District of Columbia had enacted statutes authorizing civil protective orders as a means of protecting victims of domestic violence and preventing further abuse. *See id.* at 10; *see also* Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 147 n.123 (2003) (listing current protective order statutes from all fifty states).

II. Civil Protective Orders Protect Victims Of Domestic Violence And Prevent Further Abuse.

The civil protective order remains one of the most widely available and commonly used interventions for victims of domestic violence today. *See* Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 10-11; *see also* Tsai, *supra*, 68 FORDHAM L. REV. at 1292. Indeed, orders of protection have been recognized as "the frontline in the war against the abuse of women." Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 392 and n.116 (1998). One of their greatest strengths is that courts have broad discretion in tailoring a protective order to meet the unique circumstances of the battered woman and her family. *Id.* at 394. Among other things, an order of protection can include provisions restricting contact; prohibiting abusive behavior; determining child custody and visitation issues; mandating offender counseling; and even forbidding firearm possession. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., LEGAL SERIES BULLETIN 4, ENFORCEMENT OF PROTECTIVE ORDERS 1 (Jan. 2002).

Furthermore, protective orders often reduce the incidence of future violence and play a key role in improving a victim's own sense of safety. Studies have shown that in the majority of cases, victims feel that civil protective orders protect them against repeated incidents of abuse and are valuable in helping them regain their emotional well-being, sense of security, and overall control over their lives. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH PREVIEW, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS 1 (Jan. 1998). Simply filing for a retraining order can be an act that empowers a battered woman and interrupts the pattern of domination and control by her abuser. *See* Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 11.

But orders of protection, standing alone, do not contain sufficient civil or criminal mechanisms to enforce them. *See* Zlotnick, 56 OHIO ST. L. J. at 1171; *see also* NATIONAL INST. OF JUSTICE, *supra*, VICTIMS' VIEWS ON EFFECTIVENESS at 1. Approximately sixty percent of the women who obtain temporary restraining orders report that the orders are violated in the year after they were issued. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS (NCJ 171666) 50 (July 1998). Nearly a third of those women, twenty-nine percent, report that the violations involved severe violence. *Id.*; *see also* PATRICIA TJADEN & NANCY THOENNES, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (NCJ 181867) 54 (July 2000). This story has played out tragically in newspapers and courts across the country.[3]

3. *See, e.g., State v. Richardson*, 670 N.W.2d 267 (Minn. 2003) (involving estranged husband who murdered wife's friend and kidnapped and terrorized wife and children after wife obtained restraining order); *State v. Weatherholtz*, 2003 WL 21543813 (Ohio App. 3 Dist. July 9, 2003) (concerning estranged husband who entered wife's home, forced her to engage in sexual acts, and threatened to commit suicide and kill members of her family after protective order was in place); National Ctr. For Victims of Crime, Stalking Resource Center, *Protective Order Violations – Stalking in Disguise*, THE SOURCE NEWSLETTER, Vol. 4, No. 2 at 1 (Fall 2004) (recounting man who killed estranged girlfriend and then turned gun on himself; police found no-contact order next to woman's body, which man had violated four times before murdering victim); L.L. Brasier & John Masson, *Estranged Wife Killed With Ax*, DETROIT FREE PRESS, Dec. 31, 2002 (involving estranged husband who killed wife with ax while she slept next to two-year-old son five days after wife obtained personal protection order against him); David M. Herszenhorn, *Man Vowed All Week to Kill Companion, Neighbors Say*, N.Y. TIMES, Aug. 23, 1996, at B3 (concerning woman stabbed to death by her estranged husband while carrying one of two protective orders in her purse).

Moreover, orders of protection advance the safety of children as well as adults. *See* Joan Zorza, Symposium on Domestic Violence Criminal Law, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46-47 (1992). An estimated 3.3 to 10 million American children witness domestic violence annually. MARTHA B. WITWER & CHERYL A. CRAWFORD, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., A COORDINATED APPROACH TO REDUCING FAMILY VIOLENCE: CONFERENCE HIGHLIGHTS (NCJ 155184) Appendix B at 35 (Oct. 1995). In addition to the obvious psychological and emotional impact on children, there is a strong connection between domestic violence and child abduction. *See* Klein & Orloff, *supra*, 21 HOFSTRA L. REV. at 972 (noting importance of courts' awareness of connection so that civil protective orders can help deter ongoing risk of child snatching in families with history of domestic violence). Over fifty percent of abductions occur in the context of domestic violence, and seventy-seven percent of the abductors snatched the children out of a desire to hurt the other parent. *Id.* (citing studies in The Women's Advocate and the Task Force on Child Abuse and Neglect). The abduction and murder of the Gonzales children is yet another heartbreaking manifestation of how a civil protective order can fall short of saving the lives it was intended to protect.

III. Law Enforcement's Failure To Take Protective Orders Seriously Jeopardizes The Lives Of Battered Women And Their Children.

As the foregoing discussion demonstrates, court orders alone cannot stem the tide of domestic violence and deter the abusers. One of the most serious limitations of civil protective orders has been the widespread lack of

enforcement by police. NATIONAL INST. OF JUSTICE, *supra*, LEGAL INTERVENTIONS IN FAMILY VIOLENCE at 43. This lack of enforcement was founded upon a tradition of police indifference to the plight of battered women.

It goes without saying that the effectiveness of civil protective orders to protect victims of domestic violence and prevent further abuse depends on how well they are enforced. *See* NATIONAL INST. OF JUSTICE, *supra*, VICTIMS' VIEWS ON EFFECTIVENESS at 1; *see also* Truss, *supra*, 26 ST. MARY'S L. J. at 1188. In many situations, protective orders are effective only when the restrained party is convinced that the order will be enforced by the police. OFFICE FOR VICTIMS OF CRIME, *supra*, ENFORCEMENT OF PROTECTIVE ORDERS at 1. As the Justice Department has declared: "Unequivocal, standardized enforcement of court orders is imperative if protective orders are to be taken seriously by the offenders they attempt to restrain." *Id.*

The police must play a key role in protecting family members by enforcing orders of protection and arresting perpetrators who violate them. NATIONAL INST. OF JUSTICE, *supra*, A COORDINATED APPROACH at 7. Victims of domestic violence can be endangered by any breakdown in communication, failure of training, or lack of follow-through in the criminal justice system. KERRY MURPHY HEALEY & CHRISTINE SMITH, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH IN ACTION, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW 9 (July 1998). Law enforcement officers are "the gatekeepers of the criminal legal system," and their power to arrest is the "first link in a vital chain of institutional interventions that save the lives of battered women and children[.]" Barbara J. Hart, Symposium: Mandatory Arrest Laws and Policies, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207,

211 (1997); *see also* Truss, *supra*, 26 St. Mary's L. J. at 1189 and n.121 (noting that law enforcement officers are domestic violence victim's "first line of defense" and only direct link to criminal justice system). The power to make arrests is, in turn, the state's "first line of attack" on domestic violence within its borders. Jennifer R. Hagan, Symposium, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DePaul L. Rev. 919, 935 (2001). When police do not enforce existing laws, the very foundation of the state's criminal justice system, in the context of domestic violence and civil protective orders, is threatened. *Id.*

Until recently, law enforcement's under-enforcement of laws involving domestic violence was widespread.[4] Women regularly encountered police officers who treated domestic violence as "non-serious, non-criminal, or as a private matter best settled within the home." Truss, *supra*, 26 St. Mary's L. J. at 1189. Such archaic misconceptions and stereotypes contributed to law enforcement's failure to arrest men who were abusing their partners or violating protective orders. *See id.*; *see also* James Ptacek, Battered Women in the Courtroom 161-63 (1999) (describing police response to domestic violence calls).

4. *See, e.g.*, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (involving police refusal to respond to woman's repeated requests for protection; police watched as estranged husband stabbed and kicked her in the neck, throat, and chest, paralyzing her from the neck down and causing permanent disfigurement); *Eagleston v. Guido*, 41 F.3d 865, 869 (2d Cir. 1994) (concerning husband who brutally stabbed wife 30 times despite entreaties to police that he was violating protective order), *cert. denied*, 516 U.S. 808, 116 S. Ct. 53, 133 L. Ed. 2d 18 (1995); Yumi Wilson, *When Court Order Isn't Enough*, S.F. Chron., Sept. 20, 1996, at A1 (recounting woman murdered by her ex-boyfriend after she reported that he had violated restraining order against him several times, yet police took no action).

All too often, police responded to domestic violence calls either by taking no action at all, by purposefully delaying response in the hope of avoiding confrontation, or, when officers did respond, by attempting to mediate the situation and separate the parties so they could "cool off." *See* Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643, 649 (1997). Data collected by several agencies suggested that police seldom made arrests in cases of domestic violence to which they actually responded – as little as three to fourteen percent of the time. *See* Sarah Mausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 Harv. Women's L. J. 213, 217 (1988) (citing various studies on low arrest rates by police). When an arrest was made, it was usually because the abuser was belligerent or violent to the officers themselves, not as a result of the obvious abuse inflicted upon the woman. Hoctor, *supra*, 85 Cal. L. Rev. at 649. Other anecdotal evidence suggested that officers openly blamed the wives for being victims of domestic violence or made comments implying that they deserved to be beaten by their husbands. *See* Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help them When the Police Won't?*, 95 Yale L. J. 788, 798 n.46 (1986); *see also* Zorza, *supra*, 83 J. Crim. L. & Criminology at 47-52 (discussing police response to domestic violence calls).

Therefore, not only were battered women threatened by the violence they faced, but they were also struggling against a tradition of police indifference – even open hostility – that severely limited the efficacy of the criminal justice system. Significantly, law enforcement's dismissive approach to domestic violence calls and the cries of battered women for protection was not attributable to a few "rogue officers."

Hoctor, *supra*, 85 CAL. L. REV. at 649. To the contrary, throughout the 1960s, 1970s, and 1980s, law enforcement policies characterized domestic violence as a private matter between the parties in which it should not interfere. *Id.*

In 1967, the International Association of Chiefs of Police declared in its training manual that "in dealing with family disputes,[5] the power of arrest should be exercised as a last resort." Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1-42 (1992), reprinted in NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW 499 (2001). This position was later endorsed by the American Bar Association, whose 1973 *Standards for the Urban Police Function* stated that police should "engage in the resolution of conflict such as that which occurs between husband and wife ... in the highly populated sections of the large city, without reliance upon criminal assault or disorderly conduct statutes." *Id.* The Oakland Police Department's 1975 training manual described the role of a police officer in a domestic violence case as "more often that of a mediator

5. Even the characterization of domestic violence as a "family dispute" attributed to the continuing notion that domestic violence was not a crime but a private matter less deserving of law enforcement's attention. It is interesting to note that the International Association of Chiefs of Police has since renounced its earlier position on this issue. Today, the organization pronounces to all of America's law enforcement officers: "Protecting victims of domestic violence is a critical part of our job. The actions you take in these situations can clearly save lives. Orders of protection are issued to ensure the safety of victims of domestic violence. We need to enforce these orders to the *best* of our abilities." *See Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* at 10, available at Violence Against Women Online Resources, http://www.vaw.umn.edu.

and peacemaker than enforcer of the law. . . . Normally, officers should adhere to the policy that arrests shall be avoided[.]" Zorza, *supra*, 83 J. CRIM. L. & CRIMINOLOGY at 48. Similarly, Michigan's policy directed officers to "[a]void arrest if possible" and to "[a]ppeal to their [complainant's] vanity" in discouraging arrest and the initiation of criminal proceedings. *Id.* at 49.

While the law no longer expressly granted men the right to beat and terrorize their partners, these law enforcement protocols continued to implicitly condone domestic violence and the actions of the abusers. *See* Eppler, *supra*, 95 YALE L. J. at 792-93. The end result was that domestic violence calls were assigned a low priority by police officers and were not treated as real crimes with potentially lethal consequences. Zorza, *supra*, 83 J. CRIM. L. & CRIMINOLOGY at 47. Moreover, police officers considered domestic violence calls to be "unglamorous, nonprestigious, and unrewarding" as compared to other offenses. *Id.*

Even after efforts to train and educate police officers began to emerge, law enforcement still avoided formal legal proceedings against the abusers. Jeffrey Fagan, Presentation, *The Criminalization of Domestic Violence: Promises and Limits* 8 (1996). Police officers were trained in crisis intervention, counseling, and mediation techniques – anything but arresting the violent abuser. *Id.* By 1984, only ten percent of large city police departments in the United States encouraged officers to make arrests for crimes of domestic violence. *See* Hoctor, *supra*, 85 Cal. L. Rev. at 650. However, the public began to realize that law enforcement's endemic failure to enforce the law could be devastating, even deadly. The tradition of police indifference brought about a call to action by the federal government and set the stage for the rise of mandatory arrest laws.

IV. Mandatory Arrest Laws Must Be Enforced To Effect Their Legislative Purpose And Promote The Safety Of Battered Women And Their Children.

Based upon the empirical and anecdotal evidence documenting law enforcement's reluctance to intervene on behalf of battered women or to treat domestic violence as a serious crime subject to arrest, major policy changes in the areas of police response and assistance became imperative. In 1984, the Attorney General's Task Force on Family Violence identified the failure of law enforcement to arrest for crimes of domestic violence as one of the most formidable obstacles to curtailing the epidemic of domestic violence in the United States. U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 16-18 (1984); *see also* Hoctor, *supra*, 85 Cal. L. Rev. at 650. Following several well-publicized studies on the effectiveness of mandatory arrest in domestic violence cases,[6] the Attorney General called for a "strong, coordinated

6. The most highly publicized study was conducted by researchers Lawrence Sherman and Richard Berk in 1984. Epstein, *supra*, 43 WM. & MARY L. REV. at 1854. The study, known as the Minneapolis Domestic Violence Experiment, reported that arrest significantly reduced the risk of re-offense over a six month period, as compared with alternative police responses of either ordering one party out of the residence or advising the couple on how to solve their problems at the scene. CHRISTOPHER D. MAXWELL, JOEL H. GARNER, & JEFFREY A. FAGAN, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH IN BRIEF, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 4 (July 2001). Findings from a recent replication study "provide systematic evidence supporting the argument that arresting male batterers may, independent of other criminal justice sanctions and individual processes, reduce subsequent intimate partner violence." *Id.* at 13; *see also City of Grafton v. Swanson*, 497 N.W.2d 421, 423 (N.D. 1993) (recognizing direct correlation between ineffective police intervention in domestic violence cases and continued existence of such violence).

effort by the criminal justice system" and issued a report recommending arrest as the standard response to all cases of misdemeanor domestic assault. ATTORNEY GENERAL'S TASK FORCE, *supra*, at 5-6, 17; *see also* Epstein, *supra*, 43 WM. & MARY L. REV. at 1854. Subsequent congressional hearings involved extensive testimony on law enforcement's longstanding practice of treating domestic violence less seriously than other similarly violent crimes. *See, e.g.*, S. Rep. No. 103-138, at 41 (1993) (citing Washington, D.C. study that in 85% of cases where woman was found bleeding, police failed to arrest her attacker).

Finally, on September 13, 1994, President Clinton signed the Violence Against Women Act ("VAWA") into law as part of the Omnibus Crime Bill of 1994. *See* Pub. L. No. 103-222, 108 Stat. 1796 (1994) (reauthorized in 2000 by Pub. L. No. 106-386, Div. B, 114 Stat. 1464 (2000)). The VAWA represented a significant turning point in the battered women's movement in two material respects. First, it recognized protective orders as one of the most important methods of combating domestic violence and protecting battered women and their children. *See* 18 U.S.C. § 2265 (requiring states to give full faith and credit to protective orders issued by other states). Second, the VAWA included a provision requiring mandatory arrest or pro-arrest policies as a condition for receipt of funding by state and local governments. *See* 42 U.S.C. § 3796hh (endorsing mandatory arrest and pro-arrest policies); *see also* NATIONAL INST. OF JUSTICE, *supra*, LEGAL INTERVENTIONS IN FAMILY VIOLENCE at 38 n.4. In the wake of the pronouncements by the Attorney General and the testimony generated from the congressional hearings, many states, including Colorado, began passing mandatory arrest laws. This legislation represented a reversal in law enforcement's "long-standing nonintervention

protocol" in domestic violence cases. Epstein, *supra*, 43 WM. & MARY L. REV. at 1855.

Mandatory arrest laws are designed to remove or otherwise restrict an officer's discretion in determining whether to make an arrest when responding to a domestic violence call. Goodmark, *supra*, 23 St. LOUIS U. PUB. L. REV. at 15. As such, mandatory arrest laws counteract the systemic problem of police indifference. Wanless, *supra*, 1996 U. ILL. L. REV. at 542. Today, Colorado is one of more than twenty states and the District of Columbia that have implemented statutes mandating arrest in domestic violence situations.[7]

7. *See* Epstein, *supra*, 43 WM. & MARY L. REV. at n.42 (cataloguing mandatory arrest statutes). The following states mandate arrest when there is probable cause to believe that a violation of a protective order has occurred: ALASKA STAT. § 18.65.530(a)(2); CAL. PENAL CODE § 836(c); COLO. REV. STAT. § 18-6-803.5; KY. REV. STAT. ANN. § 403.760(2); LA. REV. STAT. ANN. § 14:79(E); MD. CODE ANN., FAM. LAW § 4-509(b); MASS. GEN. LAWS ANN. ch. 209A, § 6(7); ME. REV. STAT. ANN. tit. 19-A, § 4012(5); MINN. STAT. ANN. § 518B.01, subd. 14(e) and subd. 22(c); MO. REV. STAT. § 455.085(2); NEV. REV. STAT. ANN. § 33.070(1); N.J. STAT. ANN. § 2C:25-21(a)(3); N.M. STAT. ANN. § 40-13-6(C); N.D. CENT. CODE § 14- 07.1-11(1); OHIO REV. CODE ANN. § 2935.032; OR. REV. STAT. § 133.310(3); 23 PA. CONS. STAT. ANN § 6113(a); R.I. GEN. LAWS § 12-29-3(b)(1); S.D. CODIFIED LAWS § 23A-3-2.1(1); TENN. CODE ANN. § 36-3-611(a)(2); TEX. CRIM PROC. CODE ANN. § 14.03(b); UTAH CODE ANN. § 30-6-8(1); WASH. REV. CODE ANN. § 10.31.100(2)(a); WIS. STAT. ANN. § 813.12(7)(b). The following states mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated: ALASKA STAT. § 18.65.530(a)(1); ARIZ. REV. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 46b-38b(a); D.C. CODE ANN. § 16-1031; IL. COMP. STAT. 60/304(a)(1); IOWA CODE ANN. § 236.12(2)(b); LA. REV. STAT. ANN. (Cont'd)

Under these statutes, there are generally five circumstances that are grounds for mandatory arrest:

> (1) when there is probable cause to believe violence has occurred or is likely to occur; (2) when there is probable cause to believe a protection order has been violated; (3) when a violation of a protection order occurs in the officer's presence; (4) when there is probable cause of aggravated battery; and/or (5) when the officer observes a physical injury.

Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 180 n.44 (1994) (cataloguing mandatory arrest laws).

While the language, scope, and threshold of mandatory arrest laws vary from state to state, the legislative intent has always been the same: to criminalize domestic violence, protect battered women and children, and combat police indifference by removing some level of discretion in the decision to arrest. Each mandatory arrest law sends an unequivocal message to abusers, victims, and society alike that domestic violence and civil protective orders will be taken seriously, that the law will be enforced, and that battered women and children will be safeguarded. The corresponding mandate that police

(Cont'd)
§ 46:2140(1); ME. REV. STAT. ANN. tit. 19-A, § 4012(5); NEV. REV. STAT. ANN. § 171.137(1); N.J. STAT. ANN. § 2C:25-21(a)(1); OHIO REV. CODE ANN. § 2935.032; OR. REV. STAT. § 133.310(6); R.I. GEN. LAWS § 12-29-3(b); S.D. CODIFIED LAWS § 23A-3-2.1(2); UTAH CODE ANN. § 30-6-8(2); WASH. REV. CODE ANN. § 10.31.100(2)(c); WIS. STAT. ANN. § 968.075(2).

officers take affirmative action in these circumstances is equally as clear.

The New Jersey legislature eloquently articulated the purpose behind its mandatory arrest law as follows:

> The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; . . . and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. *It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.*
>
> * * *
>
> The Legislature further finds and declares that even though many of the existing criminal statutes are applicable to acts of domestic violence, *previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context. . . .*
>
> It is the intent of the Legislature to stress that *the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim. . . .* It is further intended that the official response to domestic violence shall communicate

> the attitude that violent behavior will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation.

N.J. STAT. ANN. § 2C:25-18 (emphases added). Similarly, Colorado's legislature indicated a definitive intent to impose mandatory obligations on the police and others involved in the criminal justice system who deal with domestic violence:

> First of all, . . . the entire criminal justice system must act in a consistent manner, which does not now occur. *The police must make probable cause arrests.* The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.
>
> *So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal.* And so we hope that House Bill 1253 starts us down this road.

Gonzales, 366 F.3d at 1107 (quoting Tr. of Colorado House Judicial Committee Hearings on House Bill 1253, Feb. 15, 1994, at 3) (emphases added). The passage of mandatory arrest laws, in Colorado and elsewhere, represents a significant step in the right direction.

The mere act of arrest communicates to the abuser and declares to society that domestic violence is a crime that will

be punished and no longer tolerated. Hoctor, *supra*, 85 CAL. L. REV. at 659. In this regard, "[m]andatory arrest is a crucial step to criminalizing domestic violence." Wanless, *supra*, 1996 U. ILL. L. REV. at 537. Moreover, mandatory arrest clarifies the role of police in domestic violence cases and helps guarantee victims some response from the criminal justice system. *Id.* at 547. Mandatory arrest laws force police officers to take domestic violence and violation of protective orders seriously and to protect victims, something they failed to do for centuries. Epstein, *supra*, 43 WM. & MARY L. REV. at 1865; *see also* Buel, *supra*, 11 HARV. WOMEN'S L. J. at 220-224 (identifying benefits of mandatory arrest).

Since their emergence, mandatory arrest laws have been credited with improving police responsiveness to domestic violence around the country. *See* Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 15 (citing statistics). One of the most significant areas in which mandatory arrest policies have begun to make a difference is in the enforcement of civil protective orders. Hagan, *supra*, 50 DEPAUL L. REV. at 977. This improvement is particularly compelling given that the "enforcement of protective orders is arguably the most important duty of the criminal justice system in combating domestic violence." *Id.* Notably, reports by the American Bar Association and Department of Justice have concluded that "[p]olice should assess the danger to children as well as to adults in the home, and mandatory arrest for violating orders of protection should include violations of provisions restricting contact between the perpetrator and his or her children." NATIONAL INST. OF JUSTICE, *supra*, A COORDINATED APPROACH, Appendix B at 35. Compliance with this directive would have served the Gonzales children well.

Conversely, the failure to arrest men who are abusing their partners or violating protective orders leaves victims fully exposed to the imminent threat of domestic violence and serves to reinforce abusers' belief that their conduct is acceptable. *See* Truss, *supra*, 26 ST. MARY'S L. J. at 1190. "Men ... [get] the message from police officers that woman battering is not a crime and that the sanctions of the criminal justice system – sanctions which presumably exist to deter and punish those who have the inclination to behave in antisocial ways – are routinely not invoked by police officers and that therefore they have nothing to fear if they beat the women with whom they are, or were, involved." Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1148 (1994) (quoting Eva Jefferson Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN 79, 82-83 (Donna M. Moore ed., 1979)). Without mandatory arrest, victims of domestic violence will be at the mercy of a responding officer's particular views and prejudices regarding arrest and enforcement of the law. Wanless, *supra*, 1996 U. ILL. L. REV. at 547.

In this case, the Castle Rock Police Department failed to honor Colorado's legislative mandate to treat domestic violence as the crime that it is. The Tenth Circuit Court of Appeals' decision reaffirms to society and to law enforcement that domestic violence and the violation of protective orders *are* grievous crimes that must be treated accordingly. A reversal of the Tenth Circuit's decision in this case will undermine the very purpose for which protective orders and mandatory arrest laws were implemented and dismantle the rights and remedies that the Colorado legislature so meticulously pieced together in the protection of battered women and their children. A reversal of the Tenth Circuit's

decision will, in effect, be a reversal of the strides this country has made in the continuing campaign against domestic violence.

CONCLUSION

"The single greatest source of assistance that the judicial system can offer is enforcement of the laws designed to protect victims from further abuse and violence." Truss, *supra*, 26 ST. MARY'S L. J. at 1201-02. Following years of nonintervention – even condonation – by society, the courts, and the police, mandatory arrest laws were passed to ensure the enforcement of protective orders and the safety of battered women and children. Indeed, they were enacted to combat the very indifference that the Castle Rock Police Department demonstrated here. Mandatory arrest must be preserved as the foundation for an effective criminal justice system that affords victims of domestic violence the fundamental rights they were denied for centuries and have struggled so hard to attain. For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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